Supreme Court, U.S.
FILED
MAR 28 1990
JOSEPH E. SPANIOL, JR.
CLERK

No. 89-1315

In The Supreme Court
OF THE
United States

OCTOBER TERM, 1989

THE HOSPITAL AUTHORITY OF GWINNETT COUNTY, GEORGIA, Individually and d/b/a GWINNETT AMBULANCE SERVICES,
Petitioner,

v.

R. STANFORD JONES, Administrator of the Estate of WILLIAM HAROLD O'KELLEY, Deceased,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

* HAROLD N. HILL, JR.
E. CLAYTON SCOFIELD III
HURT, RICHARDSON, GARNER, TODD & CADENHEAD
Suite 1400
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

Attorneys for Petitioner

* Counsel of Record

Of Counsel:

MEADE BURNS
MILTON B. SATCHER
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700

TABLE OF CONTENTS

		Page
Table of Contents		i
Table of Authorities		ii
I.	The Facts	2
II.	Constitutional Considerations	4
	A. Due Process, Vagueness, and the Georgia Law	4
	B. Standards for Determining the Amount of Punitive Damages	5
	C. Equal Protection	7
III.	Conclusion	8

TABLE OF AUTHORITIES

Cases

	Page
Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988)	5,7
Browning-Ferris Industries v. Kelco Disposal, Inc., 109 S.Ct. 2909, 106 L.Ed. 2d 209 (1989)	7
Curl v. First Federal Savings and Loan Association, 243 Ga. 842, 257 S.E.2d 264 (1979)	5
Dorsey v. Green, 204 Ga. 453, 49 S.E.2d 901 (1948)	7
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)	7
Grayned v. City of Rockford, 408 U.S. 104 (1972)	5
Head v. John Deere Plow Co., 71 Ga. App. 276, 30 S.E.2d 662 (1944)	5
Holland v. Williams, 3 Ga. App. 636 (1907)	6
Hospital Authority of Gwinnett County v. Jones, 259 Ga. 759, 386 S.E.2d 120 (1989) (Appendix A-1)	6
Kolodkin v. Griffin, 87 Ga. App. 725, 75 S.E.2d 197 (1953)	5
Moon v. Moon, 216 Ga. 627, 118 S.E.2d 473 (1961)	7
Santosky v. Kramer, 455 U.S. 745 (1982)	8
Smith v. Wade, 461 U.S. 30 (1983)	5
Village of Hoffman Estates v. Flip Side, 455 U.S. 489 (1982)	4,5,7
Wheels & Brakes, Inc. v. Capital Ford Truck Sales, Inc., 167 Ga. App. 532, 307 S.E.2d 13 (1983)	6

Page

State Statutes

Official Code of Georgia Annotated § 5-5-20 (1982) 6

Official Code of Georgia Annotated § 9-11-21 (1982) 6

Official Code of Georgia Annotated § 9-11-42 (1982) 6

Official Code of Georgia Annotated § 51-12-5 (1982) 8

Official Code of Georgia Annotated § 51-12-5.1 (1987) 8

Official Code of Georgia Annotated § 51-12-12 (1982) 6

No. 89-1315

In The Supreme Court
OF THE
United States

OCTOBER TERM, 1989

THE HOSPITAL AUTHORITY OF
GWINNETT COUNTY, GEORGIA,
Individually and d/b/a
GWINNETT AMBULANCE SERVICES,

Petitioner,

v.

R. STANFORD JONES, Administrator of the Estate
of WILLIAM HAROLD O'KELLEY, Deceased,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

This brief is filed in reply to the brief of respondent in opposition to the petition for certiorari. Rule 15.6. Petitioner, Hospital Authority of Gwinnett County ("the Hospital Authority"), submits that the petition for certiorari, augmented by this reply, amply demonstrates that the writ of certiorari to the Supreme Court of Georgia should be granted.

I. THE FACTS

The facts in this case demonstrate that the punitive damages award against the Hospital Authority was unconstitutional. The evidence at trial was disputed; but even viewed in the light most favorable to respondent, the facts do not show conduct which might be expected to subject the Hospital Authority to liability for more than one million dollars in punitive damages.

This case arose from a serious automobile accident involving a medical emergency in which the plaintiff's decedent, Mr. O'Kelley, was severely burned and mortally injured. At the accident scene, the advanced EMT in charge, being unable to begin an IV, made the decision to transport O'Kelley 1.3 miles to the emergency room at Joan Glancy Hospital rather than to place him on an approaching helicopter where necessary stabilization measures would be difficult or impossible to perform. The medical testimony of the attending physicians, after being fully informed of the difficulty experienced in starting the IV, confirmed the soundness of this medical decision, but it was this medically sound judgment that formed the basis for plaintiff's recovery of punitive damages.

The helicopter landed at Joan Glancy Hospital. Nearly two hours passed before the pilot was required to take off again, giving him ample time to orient himself to the surroundings and to prepare for take-off. There was no atmosphere of "confusion, mistake, and haste." There is, furthermore, no contention in this case that Mr. O'Kelley received any less than the same quality of medical care that he would have received had he been flown directly to the parking lot at the Atlanta Civic Center, loaded into an ambulance, and transported several blocks to Grady Hospital, the alternative facility available at the time of the accident. Loading and transport to Grady would necessarily have required considerably more than the 15 to 20-minute ride suggested by respondent. Joan Glancy Hospital was less than two miles from the site of the accident.

Respondent contends that, in other cases, the Hospital Authority had diverted patients away from nearby hospitals, or away from more medically appropriate hospitals, in deference to its own institutions. Even accepting the questioned credibility of the testimony concerning such conduct, it was nonetheless undisputed in the instant case that Joan Glancy Hospital was the hospital nearest to the scene of the accident, and that it offered a well-qualified medical facility fully capable of stabilizing and treating this patient and, if necessary, arranging transport to a specialized burn treatment facility. Furthermore, there were sound medical reasons for transporting this severely burned patient 1.3 miles to Joan Glancy rather than risking a helicopter flight without commencing medical treatment. There was no evidence of the "revenue considerations" suggested by respondent, other than the hospital's bill for its services totaling approximately $1,200.

The helicopter crash resulted from pilot error, not negligence, much less willful misconduct, on the part of the Hospital Authority. The pilot had landed safely, and he had been on the scene for approaching two hours, sufficient to have investigated the take-off conditions. Whether arising from a manual mistake by the pilot, or an empty helicopter water-alcohol tank, the error causing the crash should not have been attributed to the hospital.

It is undisputed that Mr. O'Kelley was only slightly injured, if injured at all, as a result of the helicopter crash. After the crash, he was reexamined in the emergency room, and then transported to the burn unit at Grady Hospital in Atlanta, where he was appropriately treated. At all times, he received proper medical care. Any actual damages suffered, as reflected by respondent's claim to only nominal damages (A-27), were negligible.

II. CONSTITUTIONAL CONSIDERATIONS

A. Due Process, Vagueness, and the Georgia Law.

Respondent's arguments are not responsive to petitioner's constitutional challenges. The scant guidance given the jury in this case was that punitive damages might be awarded "where there are aggravating circumstances, either in the act or the intention"; that such damages "may be authorized where the circumstances of the wrong are such as to show an entire want of care, and an indifference to the consequences"; and that willful and intentional misconduct is not required (A-27-28). "It is sufficient," the jury was instructed, "that the act be done under such circumstances as evinces an entire want of care and conscious indifference to consequences." (A-27-28) In essence, this was the sum total of the guidance given.

Respondent's reliance upon the scienter requirement recognized in *Village of Hoffman Estates v. Flip Side*, 455 U.S. 489, 498-499 (1982), as well as the Georgia Supreme Court's reliance thereon (A-7), is misplaced. The ordinance in question in *Flip Side* required a business to obtain a license if it sold items "designed or marketed for use with illegal cannabis or drugs." As the court noted, the illegal drugs were specified by law, and the words "designed" and "marketed" were sufficient to put the business on notice that a license was required. There is no comparable scienter requirement contained in "an entire want of care, and an indifference to the consequences," as the jury was instructed were the conditions upon which it could award punitive damages here (A-27).

Application of Georgia law to this case does not provide any notice of prohibited conduct to the defendant and does not provide the jury any discernible standard for determining when specific conduct warrants the imposition of punitive damages and, if so, how much. Contrary to respondent's assertion, punitive damages are at least quasi-criminal, and, as such, are subject to a "relatively

strict test" for vagueness. *See Village of Hoffman Estates v. Flip Side, supra.* In this case, the law in Georgia is unconstitutionally vague.[1]

B. Standards for Determining the Amount of Punitive Damages.

The Supreme Court of Georgia in the instant case tacitly recognized the lack of ascertainable standards for awarding punitive damages, by suggesting in this case, for the first time, that the trial courts in Georgia "consider" charging on eight factors appropriate to a punitive damages verdict (A-8 n.13). (Respondent's implication that petitioner was protected by these eight factors, first announced on appeal in this very case, is inappropriate, to say the least.) The Georgia law, nevertheless, is clear that the measure of punitive damages is no more than "the enlightened conscience of an impartial jury." *Curl v. First Federal Savings and Loan Association*, 243 Ga. 842, 257 S.E.2d 264 (1979); *Kolodkin v. Griffin*, 87 Ga. App. 725, 732, 75 S.E.2d 197 (1953); *Head v. John Deere Plow Co.*, 71 Ga. App. 276, 279, 30 S.E.2d 662, 664 (1944).

"The measure of such damages is your enlightened conscience as an impartial juror . . . ," the jury was instructed (A-27). No other standard was provided, or required by Georgia law. Allowing this "wholly standardless discretion" (*Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 88 (1988)) violates the due process rights of defendants, subjects them to the whims of a jury, and exposes them to punitive damages awards "frequently based upon . . . caprice and prejudice." *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

---

[1] "A vague law impermissibly delegates basic policy matters to . . . judges, and juries for resolution on an *ad hoc* and subjective basis with attendant dangers of arbitrary and discriminatory applications." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).

Post-trial judicial review in Georgia does not eradicate the constitutional infirmities inherent in Georgia law in allowing juries to award punitive damages without guidance in the first instance. O.C.G.A. § 51-12-12 expressly states that "[t]he question of damages is one for the jury; and the Court should not interfere with the jury's discretion unless the damages are so small or excessive as to justify the inference of gross mistake or undue bias . . .." Such a post-verdict review on its face provides little protection.

The other post-trial review mechanisms are similarly deferential to jury determinations. Under O.C.G.A. § 5-5-20, on a motion for new trial, if the judge can conscientiously acquiesce in the verdict, even though it may not exactly accord with his best judgment, he should approve it, and the appellate courts will uphold him in so doing. *Holland v. Williams*, 3 Ga. App. 636, 638 (1907), *quoted in Hospital Authority of Gwinnett County v. Jones*, 259 Ga. 759, 386 S.E.2d 120, 130 (1989) (Appendix A-1, 10). Likewise, this implied presumption in favor of the jury's standardless determination provides little real protection against an arbitrary and capricious jury award of punitive damages.

Nor does O.C.G.A. § 51-12-12 provide the review necessary to overcome the constitutional defects. Only if an award is so excessive "as to shock the judicial conscience," will it be disturbed. The threshold is set so high as to be meaningless in the context of a punitive damage award. Review of the Georgia case law shows that the authority to set aside under all these post-verdict mechanisms has been rarely and sparingly applied. None of these post-trial procedures counterbalances the standardless discretion accorded Georgia juries to return such verdicts in the first instance.

Suggesting that petitioner might have requested a bifurcated trial simply avoids the issues presented. Allowance of bifurcation is discretionary with the trial court, O.C.G.A. §§ 9-11-42, 9-11-21; *Wheels & Brakes, Inc. v.*

Capital Ford Truck Sales, Inc., 167 Ga. App. 532, 307 S.E.2d 13 (1983), and, in practice, is rarely granted. A defendant is not entitled to bifurcation as a matter of right; but even if bifurcation were mandatory, such a procedure would not address the vagueness of the threshold determination of prohibited conduct or the vagueness of the standards applied to the determination of the amount of punitive damages.

Contrary to respondent's contention, petitioner is not required to request charges on the allowance of punitive damages, for which it denies any liability whatsoever, and as to which the court is required to charge correctly on the law. The court has a duty to charge the jury on the law applicable to all substantial issues involved, even without request. *Moon v. Moon*, 216 Ga. 627, 118 S.E.2d 473 (1961); *Dorsey v. Green*, 204 Ga. 453, 49 S.E.2d 901 (1948). Petitioner submits that the trial court charged in accordance with the existing Georgia law. The charge was error, however, because the Georgia law is unconstitutional for the reasons outlined elsewhere herein and in the original petition.

C. Equal Protection.

Petitioner submits that the penal nature of punitive damages is beyond argument. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2932, 106 L.Ed. 2d 209 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, *supra* at 87; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Punitive damages subject defendants to penalties in the form of damages which may be financially devastating and stigmatizing, without the protection that criminal defendants subject to fines are constitutionally guaranteed. This invidious discrimination between civil and criminal defendants amounts to a denial of equal protection under the stricter scrutiny which the criminal or quasi-criminal nature of punitive damages ought to require. *See, e.g., Village of Hoffman Estates v. Flip Side*, *supra* at 499-500.

Respondent contends that petitioner was not disadvantaged by the absence of a higher standard of proof because petitioner allegedly chose not to put up evidence in mitigation of punitive damages (Respondent's Brief at 17). Presumably, respondent also would contend that a criminal defendant who puts the state to its burden of proof "beyond a reasonable doubt," presenting no evidence, would similarily not be disadvantaged if the court, instead, applied a preponderance of the evidence standard. Respondent's position is patently untenable. It is the punitive and penal nature of punitive damages which should, in the interests of both equal protection and due process, require an elevated standard of proof, not the quantity of evidence put up. *See Santosky v. Kramer*, 455 U.S. 745, 756 (1982).

Petitioner submits that similarly situated defendants, subject to punitive and penal damages (or fines), should be protected by the same procedural safeguards. Civil defendants subject to punitive damages in Georgia are not afforded equivalent protection, however, against arbitrary and capricious jury awards, and are thus depreived of equal protection of the laws.

III. CONCLUSION

Certiorari should not be denied, as respondent implies, because of the 1987 revision of O.C.G.A. § 51-12-5 into what is now O.C.G.A. § 51-12-5.1 (which is inapplicable here). The new code section merely codifies the prior case law definition of "aggravating circumstances," to wit, "wilful misconduct, malice, fraud, wantonness, or oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences." O.C.G.A. § 51-12-5.1. The same standardless discretion has, therefore, been imported into the new statute, in-

fecting it as well. The petition for writ of certiorari to the Supreme Court of Georgia should be granted.

Respectfully submitted,

*By: /s/ HAROLD N. HILL, JR.
Harold N. Hill, Jr.

By: /s/ E. CLAYTON SCOFIELD III
E. Clayton Scofield III

Attorneys for Petitioner
* Counsel of Record

HURT, RICHARDSON, GARNER,
TODD & CADENHEAD
Suite 1400
999 Peachtree Street, N.E.
Atlanta, Georgia 30309-3999
(404) 870-6000

Of Counsel:

MEADE BURNS
MILTON B. SATCHER
LONG, WEINBERG, ANSLEY & WHEELER
999 Peachtree Street, N.E.
Suite 2700
Atlanta, Georgia 30309
(404) 876-2700